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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 202

PAN AMERICAN AIRWAYS, INC. and NATIONAL SURETY CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

HENRY J. FRIENDLY,
Counsel for Petitioners.

J. E. YONGE,
RUPERT WARREN,
Of Counsel.

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IN THE

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OCTOBER TERM, 1943

PAN AMERICAN AIRWAYS, INC. and NATIONAL SURETY CORPORATION, Petitioners, v. UNITED STATES OF AMERICA, Respondent.	No. .....

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pan American Airways, Inc. and National Surety Corporation pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that Court rendered in the above cause on April 29, 1943 (R. 45).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. § 347(a)).

Summary Statement of Matter Involved

This case requires determination of the source and extent of the liability of air carriers for the unlawful transportation of aliens into the United States.

Petitioners contend that this liability arises solely from the provisions of Section 7(d)(3) of the Air Commerce Act of 1926, 49 U. S. C. A. § 177(d)(3), authorizing the Secretary of Labor to provide by regulation for the application to civil air navigation of the laws and regulations relating to immigration, and that the liability is limited to the civil penalty of $500 provided under Section 11(b) of that Act, 49 U. S. C. A. § 181(b).

The District Court (R. 21) agreed that liability arose solely from regulations made by the Secretary of Labor under Section 7(d)(3) of the Air Commerce Act of 1926 but held that where the Secretary had made applicable an immigration law which provided a penalty of more than $500, the higher penalty might be enforced, in spite of the provisions of Section 11(b).

The majority of the Circuit Court of Appeals (R. 37) held that liability arose under Section 9 of the Immigration Act of 1903, which was considered to apply of its own force, that the penalty of $1,000 provided in that section was therefore applicable, and that it was unnecessary to consider Section 11(b) of the Air Commerce Act.

Judge Hutcheson wrote a dissenting opinion (R. 40) sustaining the position of the petitioners.

Section 9 of the Immigration Act of 1903, 8 U. S. C. A. §145, provides that "It shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States" aliens afflicted with certain diseases or mental defects.

Before any occasion had arisen for determining whether Section 9 of the Immigration Act of 1903 applied to aircraft, Congress enacted the Air Commerce Act of 1926. Section 7 of that Act, 49 U. S. C. A. §177, is entitled "Appli-

cation of Existing Laws Relating to Foreign Commerce." Section 7 provides that the navigation and shipping laws, including any definition of the words "vessel" or "vehicle" found therein, shall not be construed to apply to aircraft, and authorizes the Secretary of the Treasury, the Secretary of Commerce and the Secretary of Labor "by regulation to provide for the application to civil air navigation of the laws and regulations" relating to customs and public health, entry and clearance of vessels, and immigration, respectively. Section 11(b) of the Act, 49 U. S. C. A. §181(b), provides a uniform maximum penalty of $500, *which may be remitted or mitigated,* for violation of any regulation made under the terms of Section 7.

Pursuant to the authority thus conferred, the respective Secretaries have promulgated regulations making applicable various of the statutes relating to customs and public health, entry and clearance, and immigration. The regulations issued by the Secretaries of the Treasury and of Commerce impose the penalty of $500 provided for in Section 11(b). However, the regulation issued by the Secretary of Labor provides that the penalty shall be $500 except when a different penalty is provided under the statute which is made applicable by the regulations.

The District Court (R. 21) sustained this regulation, holding that the penalty prescribed by Section 11(b) does not apply to a regulation making applicable to aircraft a law of Congress carrying its own penalty. The majority of the Circuit Court of Appeals held that Section 9 of the Immigration Act of 1903 applied to aircraft of its own force, and that it was therefore unnecessary to consider the applicability of the uniform maximum penalty provision of Section 11(b) of the Air Commerce Act of 1926.

Petitioners contend that the Circuit Court of Appeals erred in holding that Section 9 of the Immigration Act of

1903 applies to air transportation of its own force; and that the District Court, while correctly holding that liability in the case of aircraft arises solely by virtue of a regulation issued under Section 7(d)(3) of the Air Commerce Act of 1926, failed to give proper effect to Section 11(b) of that Act which prescribes a uniform maximum penalty of $500 subject to remission or mitigation.

The Questions Presented

1. Does the liability of an air carrier for unlawfully transporting aliens into the United States, as held by the District Court and Judge Hutcheson, arise solely from regulations made by the Secretary of Labor under Section 7(d) of the Air Commerce Act of 1926, authorizing the Secretary "by regulation to provide for the application to civil air navigation of the laws and regulations relating to the administration of the immigration laws," or, as held by the majority of the Circuit Court of Appeals, does such liability arise under Section 9 of the Immigration Act of 1903 of its own force?

2. If the District Court and Judge Hutcheson were correct in concluding that the liability of an air carrier for unlawfully transporting aliens into the United States arises solely from regulations made by the Secretary of Labor under Section 7(d)(3) of the Air Commerce Act, is the penalty not limited to $500, as held by Judge Hutcheson, by Section 11(b) of that Act?

Reasons Relied on for the Allowance of the Writ

While the point directly involved in this case is narrow, it is one which is constantly arising and which, in the absence of authoritative determination here, will arise even more

frequently with the ever-growing importance of aircraft as carriers of passengers into the United States.

The question is not simply whether the petitioners should pay a fine of $1,000 or the uniform maximum penalty of $500 provided in Section 11(b) of the Air Commerce Act. The latter penalty is subject to mitigation or remission by administrative action which may take account of the peculiar problems of air transportation, whereas the $1,000 penalty under Section 9 of the Immigration Act of 1903 is inflexible. However, as a result of the decision of the Circuit Court of Appeals, the case presents a far broader question than that. It raises the general question whether all the various laws relating to immigration, customs and public health, and entry and clearance of vessels which were enacted from time to time over a period of years in connection with surface transportation, are to be applied to aircraft if, under a literal construction, they can be interpreted to include air transportation as well—in spite of the declaration by Congress, in Section 7 of the Air Commerce Act, that those laws should be made applicable to air commerce only to such extent and upon such conditions as the respective Secretaries of the Treasury, Commerce and Labor should deem advisable.

The effect of the decision of the Circuit Court of Appeals is to frustrate the evident intent of Congress and require the application to air transportation of general laws relating to immigration, customs and public health, and entry and clearance, without administrative consideration or determination whether they are necessary and workable in the case of aircraft.

It is submitted, therefore, that the case involves an important question of Federal law which has not been, but should be, settled by this Court.

WHEREFORE, petitioners respectfully pray that a writ of certiorari issue under the seal of this Court to review the judgment of the Circuit Court of Appeals for the Fifth Circuit in the above case, and that said judgment be reversed.

HENRY J. FRIENDLY,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION

The majority opinion of the Circuit Court of Appeals (R. 37) and Judge Hutcheson's dissenting opinion (R. 40) are reported in 135 F. (2d) 51. The opinion of the District Court (R. 21) is reported in 39 F. Supp. 297.

Statement of the Case

This action was brought on a bond (R. 3) which petitioner Pan American Airways, Inc. was required to furnish as a condition to obtaining clearance papers pending a determination of its liability for the payment of any fines which might be imposed in the course of its operations for violation of the immigration laws. This bond was required pursuant to Rule 5A2 issued by the Secretary of Labor under the authority of Section 7 (d) of the Air Commerce Act, which provided that aircraft when arriving from non-contiguous territory should be treated as vessels.

The Secretary of Labor found that, on February 3, 1935, Pan American Airways, Inc. had transported by aircraft from Nassau, Bahamas to Miami, Florida an alien afflicted with tuberculosis, in violation of Section 9 of the Immigration Act of 1903, as amended, and directed the payment of a $1,000 fine. The fine was not paid, and action was brought against petitioners as principal and surety on the bond.

The case was decided on the pleadings (on demurrers to the declaration, and on a motion to strike the pleadings thereto—R. 13, 21). No question of fact is involved. It is conceded that there was a violation, and the only question presented is the source and extent of the liability therefor, as set forth in the Summary Statement (petition, pp. 1-4).

Specification of Errors

The Circuit Court of Appeals erred:

1. In holding that Section 9 of the Immigration Act of 1903, as amended, is applicable to air transportation without the necessity of any regulation under the Air Commerce Act of 1926.

2. In holding that Section 11(b) of the Air Commerce Act of 1926 does not limit to $500 the penalty to which petitioners are subject.

3. In affirming the judgment of the District Court.

Statutes and Regulations

Section 9 of the Immigration Act of 1903, As Amended (Acts of March 3, 1903, c. 1012, § 9, 32 Stat. 1215; Feb. 5, 1917, c. 29, § 9, 39 Stat. 880; May 26, 1924, c. 190, § 26, 43 Stat. 166; 8 U. S. C. A. § 145).

The first sentence of Section 9, which is more particularly here involved, provides (8 U. S. C. A. § 145):

> "It shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional phychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Attorney General that any alien so brought to the United States was afflicted

with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of the provisions of this section, such later sum to be delivered by the collector of customs to the alien on whose account assessed."

At the time of the offense here involved, in 1935, the above statute referred to the Secretary of Labor rather than to the Attorney General, but otherwise was the same as it is now.

Section 7 of the Air Commerce Act of 1926 (Act of May 20, 1926, c. 344, § 7, 44 Stat. 572, 49 U. S. C. A. § 177).

This Section, subdivision (d)(3) of which is more particularly here involved, provides (49 U. S. C. A. §177):

"§177. *Application of existing laws relating to foreign commerce*

"(a) *Application of navigation and shipping laws to aircraft.* The navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft.

"(b) *Designation of ports of entry; detail of officers; application of customs and public health laws.*

The Secretary of the Treasury is authorized to (1) designate places in the United States as ports of entry for civil aircraft arriving in the United States from any place outside thereof and for merchandise carried on such aircraft, (2) detail to ports of entry for civil aircraft such officers and employees of the customs service as he may deem necessary, and to confer or impose upon any officer or employee of the United States stationed at any such port of entry (with the consent of the head of the Government department or other independent establishment under whose jurisdiction the officer or employee is serving) any of the powers, privileges, or duties conferred or imposed upon officers or employees of the customs service, and (3) by regulation to provide for the application to civil air navigation of the laws and regulations relating to the administration of the customs and public health laws to such extent and upon such conditions as he deems necessary.

"(c) *Application of laws relating to entry and clearance of vessels.* The Secretary of Commerce is authorized by regulation to provide for the application to civil aircraft of the laws and regulations relating to the entry and clearance of vessels to such extent and upon such conditions as he deems necessary.

"(d) *Designation of ports of entry for aliens; detail of officers; application of laws relating to immigration.* The Attorney General [Note: formerly Secretary of Labor] is authorized to (1) designate any of the ports of entry for civil aircraft as ports of entry for aliens arriving by aircraft, (2) detail to such ports of entry such officers and employees of the immigration service as he may deem necessary, and to confer or impose upon any employee of the United States stationed at such port of entry (with the consent of the head of the Government department or other independent establishment under

whose jurisdiction the officer or employee is serving) any of the powers, privileges, or duties conferred or imposed upon officers or employees of the immigration service, and (3) by regulation to provide for the application to civil air navigation of the laws and regulations relating to the administration of the immigration laws to such extent and upon such conditions as he deems necessary."

Section 11(b) of the Air Commerce Act of 1926 (Act of May 20, 1926, c. 344, § 11(b), 44 Stat. 574).

This section originally provided, so far as is here material, as follows:

> "(b) Any person who (1) violates any provision of subdivision (a) of this section or any entry or clearance regulation made under section 7, or (2) any customs or public health regulation made under such section, or (3) any immigration regulation made under such section, shall be subject to a civil penalty of $500 which may be remitted or mitigated by the Secretary of Commerce, the Secretary of the Treasury, or the Secretary of Labor, respectively, in accordance with such proceedings as the Secretary shall by regulation prescribe. * * *"

Certain amendments which are immaterial for present purposes were subsequently made (Act of June 19, 1934, c. 656, § 2, 48 Stat. 1116; Act of June 23, 1938, c. 601, § 1107(i)(9), 52 Stat. 1029; 49 U. S. C. A. § 181(b)).

Rule 5A2 of the Immigration Laws and Rules of January 1, 1930.

This Rule, as in force at the time of the offense here involved, was entitled "Rule 5—Application of the Immigration Laws and Regulations to Civil Air Navigation as Authorized by the Air Commerce Act of 1926," and provided:

"Par. 2. Civil aircraft engaged in foreign air commerce and bringing passengers from Canada or Mexico shall, for the purpose of the Immigration Laws and Regulations, except as herein provided for, be regarded as are other common carriers bringing aliens to border ports of entry from such countries. (Sec. 1.)

"All other civil aircraft engaged in foreign commerce shall, for the purpose of the Immigration Laws and Regulations, except as otherwise provided, be treated as vessels. (Sec. 2.)"

Rule 5G1 of the Immigration Laws and Rules of January 1, 1930.

This Rule, as in force at the time of the offense here involved, provided, so far as is here material, as follows:

"For a violation of any of these regulations, unless the penalty for such violation is otherwise provided for by immigration laws and general regulations, the civil penalty of $500 authorized by section 11, paragraph b, Air Commerce Act of 1926, will be enforced. * * *"

The amended version of the above regulation, referred to at the conclusion of Judge Hutcheson's dissenting opinion, was not issued until after the offense here in question (1941 Supplement to Code of Federal Regulations of the United States, Title 8 Aliens and Nationality, § 116.60(a)).

Summary of Argument

I. Section 9 of the Immigration Act of 1903 does not apply of its own force to air transportation.

(a) The expressed intent of Section 7 of the Air Commerce Act of 1926 is that the immigration laws, even if by their terms applicable to air transportation,

shall apply only if and to the extent determined by regulations of the Secretary of Labor.

(b) Section 9 of the Immigration Act of 1903 is not by its terms fairly applicable to the present case.

II. Since liability arises solely from the regulation made by the Secretary of Labor under the provisions of Section 7 of the Air Commerce Act, the maximum penalty of $500 provided in Section 11(b) of that Act applies.

ARGUMENT

I. Section 9 of the Immigration Act of 1903 does not apply of its own force to air transportation.

(a) The expressed intent of Section 7 of the Air Commerce Act of 1926 is that the immigration laws, even if by their terms applicable to air transportation, shall apply only if and to the extent determined by regulations of the Secretary of Labor.

When Congress, in 1926, came to enact a statute governing air commerce, there was already existing a considerable body of laws relating to immigration, customs and public health, and entry and clearance of vessels. These laws, of course, had been framed in the light of the modes of transportation existing at the respective dates of their enactment and took no account of the peculiarities of air transportation. While it was clearly necessary to have some provisions regulating air transportation in these respects, it was equally clear that blanket application of some or all of these laws might have a hampering effect upon the development of air commerce.

Congress dealt with this problem by enacting Section 7 of the Air Commerce Act of 1926, entitled "Application of Existing Laws Relating to Foreign Commerce." (This

title was supplied not by the compilers of the Code but by Congress itself—44 Stat. 572.) The Section is divided into subsections (a), (b), (c) and (d). Subsection (a) provides that the navigation and shipping laws, including any definition of "vessel" or "vehicle" found therein, shall not be construed to apply to aircraft. Subsection (b) deals with the application of customs and public health laws. Subsection (c) deals with the application of laws relating to entry and clearance of vessels. Subsection (d) deals with the application of laws relating to immigration. The last three subsections authorize the Secretary of the Treasury, the Secretary of Commerce and the Secretary of Labor "by regulation to provide for the application to civil air navigation of the laws and regulations" relating to customs and public health, entry and clearance of vessels, and immigration, respectively, "to such extent and upon such conditions as he deems necessary."

It is difficult to see how anything could be clearer than that Congress, by providing that these laws were to be applicable to aircraft to such extent and upon such conditions as the respective Secretaries deemed necessary, manifested an intention that the laws should *not* be applicable of their own force, regardless of whether they otherwise would be fairly applicable by their terms. Congress' action may be viewed either as an interpretation of the laws as never having been intended to apply to aircraft, or as a mandate that they should not thereafter apply in the absence of regulations making them applicable. *Alexander* v. *Alexandria,* 9 U. S. (5 Cranch) 1, 7; *Swigart* v. *Baker,* 229 U. S. 187, 197; *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 277.

The Secretary of Labor himself has in effect acknowledged that the immigration laws are not applicable of their own force by issuing Rule 5A2 (set out above, pages 11-12)

entitled "Application of the Immigration Laws and Regulations to Civil Air Navigation as Authorized by the Air Commerce Act of 1926," and providing that aircraft engaged in foreign commerce with non-contiguous countries shall, for the purpose of the immigration laws and regulations, be treated as vessels.

The majority of the Circuit Court of Appeals, in holding that Section 9 of the Immigration Act of 1903 applies of its own force to aircraft, based its decision solely on an interpretation of the language of that Section and wholly ignored the fact that, whatever the language, the application of Section 9 is prevented by the clear demonstration of a contrary Congressional intent in Section 7 of the Air Commerce Act.

(b) Section 9 of the Immigration Act of 1903 is not by its terms fairly applicable to the present case.

However, even on the approach which the majority of the Court of Appeals took to the case, its interpretation of Section 9 of the Immigration Act is, as shown in Judge Hutcheson's dissenting opinion, indefensible.

The first part of Section 9, which has remained unchanged since it was enacted, provides that "It shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States" aliens afflicted with certain diseases or mental defects.

As a preliminary matter, it is clear that an airplane is not a "vessel" within the meaning of the statute. This Court held in *McBoyle* v. *United States*, 283 U. S. 25, that an airplane was not a "vehicle" within the meaning of the National Motor Vehicle Theft Act because the use of the

word "vehicle" evoked in the common mind only the picture of vehicles moving on land. Similarly, in the present case, an airplane cannot be deemed to be a "vessel" within the meaning of the 1903 statute, because the use of the word "vessel" evokes in the common mind only the picture of a craft moving upon water, and not through the air. Certainly this was true in 1903 at the time of the enactment of the Immigration Act. As stated by Mr. Justice Holmes in the *McBoyle* case, "the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used."

There is, of course, no question that Pan American Airways, Inc. is both a "person" and a "transportation company". In the case at hand, however, involving a flight from Nassau, Bahamas, it was not "entering the United States from foreign contiguous territory." Unless this qualifying phrase in Section 9 is confined to "railway lines", the statute therefore does not apply.

We think it is evident that, in spite of the absence of a comma after "railway lines", the phrase "entering the United States from foreign contiguous territory" was not intended to qualify merely the words "railway lines." There would have been no need for the qualification if these words were all that were intended to be modified. There is no way by which railway lines can enter the United States *except* from foreign contiguous territory, and use of the qualifying phrase would have been pure surplusage if it were intended merely to limit the words "railway lines."

It is clear, therefore, that the phrase must be construed as qualifying at least the words "any transportation com-

pany" as well as the words "railway lines." That is enough for petitioners, since it is inconceivable that Congress could have intended, on the one hand, to limit its reference to transportation companies by this phrase and, on the other, to comprehend them within the generality of the term "any person."

While it is unnecessary to go farther, we think the only sensible construction of Section 9 is to construe the phrase "entering the United States from foreign contiguous territory" as qualifying also the words "any person." This would clearly be so if the words "including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel" were intended as a definition of the phrase "any person." This may well have been the intention, as would appear from the references in the second and third sentences of Section 9 to "any *such* person," which could only mean a person as defined and limited in the first sentence of the section. However, even if the words "any person" were intended to include persons other than those specifically mentioned in the first sentence of the section, the phrase "entering the United States from foreign contiguous territory" should be taken as qualifying the words "any person" as well as the words "transportation company" and "railway lines." In other words, the beginning of Section 9 must be construed as reading "any person, including any transportation company, other than railway lines, entering the United States from foreign contiguous territory."

Any broader construction of the words "any person" would make the "any person" clause cover the subject-matter of the "or the owner, master, agent, or consignee of any vessel" clause, which it plainly was not intended to do. As pointed out in Judge Hutcheson's dissenting opin-

ion, it is common for customs and immigration acts and regulations to contain two distinct provisions, one dealing with bringing in aliens from foreign contiguous territory, and the other with bringing in aliens by water. (In this connection, Judge Hutcheson referred to 8 U. S. C. A., Sections 216 and 217. See also *United States* v. *Hunter*, 80 F. (2d) 968, for a full discussion of the distinction between "contiguous" and "non-contiguous" territories.) Section 9 of the Immigration Act of 1903, as amended, followed this same scheme, and applied to two general classes:

(1) "any person, including any transportation company other than railway lines entering the United States *from foreign contiguous territory,*" and

(2) "the owner, master, agent, or consignee of any vessel" bringing in aliens "from a foreign country or any insular possession of the United States."

In construing Section 9 and other customs and immigration laws, it must be remembered that at the time of the enactment of these statutes there were only two means of bringing aliens into this country. One was by bringing them overland from contiguous territories, namely, Mexico and Canada, which was covered in the first part of Section 9; the other was by bringing them in by vessel, which was covered by the second part of Section 9. Transportation from a non-contiguous territory by any means other than vessels was not contemplated or covered by the wording of the statute.*

* It may be noted that the practical distinctions between transportation from contiguous territory and transportation from non-contiguous territory, so important in the case of other forms of transportation, have relatively little application to air transportation. This is another demonstration of the wisdom of Congress in providing that these laws should not be applicable to air transportation of their own force.

Thus, the statute applies only to (a) the transportation of aliens from foreign contiguous territory, except by railway, and (b) the transportation of aliens from non-contiguous territory by vessel. The transportation here in question, from Nassau, Bahamas, was not in the first category because it was not from contiguous territory, and it was not in the second category because it was not by vessel.

It should be noted that even if the Circuit Court of Appeals had been otherwise correct in holding that Section 9 of the Immigration Act of 1903 is applicable of its own force, it overlooked the fact that this is not a suit to collect a penalty as such, but an action to enforce a bond which petitioner Pan American Airways, Inc. was required to furnish as a condition to obtaining clearance papers pending a determination of its liability for any violations of the immigration laws in the course of its operations. If, as held by the Circuit Court of Appeals, the sole basis for liability were Section 9 of the Immigration Act, there would be no ground for requiring or enforcing a bond, because the only provision of Section 9 whereby a bond may be required and enforced applies solely to the owner of a "vessel." Under the *McBoyle* case an aircraft is not a vessel within the meaning of the Immigration Act itself. Hence the only source of liability on the bond is the regulation (5A2) issued pursuant to the Air Commerce Act providing that aircraft are to be treated as vessels. Under the Air Commerce Act, however, the penalty is limited to $500 as we shall now show.

II. Since liability arises solely from the regulation made by the Secretary of Labor under the provisions of Section 7 of the Air Commerce Act, the maximum penalty of $500 provided in Section 11(b) of that Act applies.

As heretofore pointed out, Section 7 of the Air Commerce Act of 1926 provides that the Secretaries, respectively, of the Treasury, Commerce and Labor may, by regulation, provide for the application to civil air navigation of the laws relating to customs and public health, the entry and clearance of vessels and immigration, to such extent and upon such conditions as may be deemed necessary. Section 11(b), prescribing penalties, then provides:

> "(b) Any person who (1) violates any provision of subdivision (a) of this section or any entry or clearance regulation made under section 7, or (2) any customs or public health regulation made under such section, or (3) any immigration regulation made under such section, shall be subject to a civil penalty of $500 which may be remitted or mitigated by the Secretary of Commerce, the Secretary of the Treasury, or the Secretary of Labor, respectively, in accordance with such proceedings as the Secretary shall by regulation prescribe."

The close correlation between, on the one hand, the subjects mentioned in Section 7, authorizing the respective Secretaries to make the laws referred to applicable to air navigation, and, on the other, the subjects mentioned in Section 11(b), leaves room for no other conclusion than that Congress, in enacting the provisions in Section 11(b) prescribing the penalty for violation of regulations made under Section 7, had reference to regulations making applicable to air navigation the laws referred to in Section 7. This

was recognized by the Secretaries of the Treasury and of Commerce, each of whom, in making applicable the laws relating to customs and the entry and clearance of vessels, prescribed that breach of any of the laws so made applicable shall subject the offender to a penalty of $500 in accordance with the Air Commerce Act (1941 Supplement to Code of Federal Regulations of the United States, Title 19 Customs Duties, § 410(b) and (c); Code of Federal Regulations of the United States, Title 14 Civil Aviation, §§ 94.17 and 94.20).

The Secretary of Labor, alone among the Secretaries to whom authority was delegated by Section 7, attempted to apply a different penalty than that provided for in Section 11(b) by prescribing (in Rule 5G1) that the penalty shall be $500 except when a different penalty is provided under the statute which is applicable by the regulation.

The District Court (R. 24), while agreeing with petitioners' contention that Section 9 of the Immigration Act has no application to air transportation except in so far as made applicable by regulation, upheld the Secretary of Labor's interpretation that the penalty limitation of Section 11(b) does not apply to a regulation making applicable a law carrying its own penalty as distinguished from a regulation not incorporating any existing law. This disregards the facts: (a) that the immigration laws are not applicable of their own force, but only by virtue of the regulation (5A2) made by the Secretary of Labor under Section 7 of the Air Commerce Act declaring that an aircraft entering the United States except from Canada and Mexico shall be deemed a vessel for the purposes of the Immigration Laws and Regulations; (b) that when so made applicable to air commerce *by regulation*, the immigration *laws* have as to air commerce only the force of *regulations;* (c) that Pan

American Airways, Inc. therefore did not violate a law but only a regulation made under Section 7; and (d) that Section 11(b) universally and without exception provides for a maximum penalty of $500 for violation of any regulation made under Section 7. Such a construction is far more consistent with the obvious intent of Congress to create uniformity than is the view taken by the District Court.

CONCLUSION

A writ of certiorari should be granted

Respectfully submitted,

HENRY J. FRIENDLY,
Counsel for Petitioners.

J. E. YONGE,
RUPERT WARREN,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 202

PAN AMERICAN AIRWAYS, INC., AND NATIONAL SURETY CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 37–40) and dissenting (R. 40–44) opinions in the circuit court of appeals are reported in 135 F. (2d) 51. The opinion of the district court (R. 21–26) is reported in 39 F. Supp. 297.

JURISDICTION

The judgment of the circuit court of appeals was entered April 29, 1943 (R. 45). The petition for a writ of certiorari was filed July 27, 1943. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does Section 9 of the Immigration Act of 1903, as amended, apply to civil aircraft of its own force or solely by virtue of adoption by the Secretary of Labor[1] in regulations issued under Section 7 (d) of the Air Commerce Act of 1926?

2. If the latter, is the applicable civil penalty the one provided by Section 9, or the one provided by Section 11 (b) of the Air Commerce Act of 1926?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 21–25.

STATEMENT

There is no dispute as to the facts. Petitioners by their demurrers (R. 7–13), pleas (R. 14–18), and stipulation for judgment (R. 27–29), conceded that on February 3, 1935, petitioner Pan American Airways, as found by the Secretary of Labor, transported from Nassau in the Bahamas to Miami, Florida, an alien afflicted with tubercu-

[1] The Attorney General was substituted for the Secretary of Labor by virtue of Reorganization Plan No. 5, effective June 14, 1940 (5 Fed. Reg. 2223; 54 Stat. 1238 (5 U. S. C. 133v)). Since this occurred after the pertinent facts arose in the present case, the textual discussion refers to the Secretary of Labor rather than to the Attorney General.

losis. The Secretary assessed a $1,000 fine and the present suit for collection was brought against petitioners as principal and surety on their bond (R. 3–6) given to secure clearance of Pan American's aircraft pending determination and payment of any alleged liability for violations of the immigration laws.

In striking three of petitioners' pleas to the declaration, the district court held that Section 9 of the Immigration Act of 1903, as amended, is applicable to air commerce only by virtue of its adoption by regulations (Appendix, *infra,* pp. 24–25) issued by the Secretary of Labor pursuant to Section 7 (d) of the Air Commerce Act of 1926, but that having been so adopted the penalty of $1,000 provided by Section 9 applies. The court said that the $500 penalty provided by Section 11 (b) of the Air Commerce Act is applicable only where the regulation violated is itself of administrative origin or carries no penalty of its own. (R. 21–26.)[2] In consequence of this determination, the parties stipulated that a final judgment be entered requiring petitioner Pan American Airways to pay $1,000 as a fine for violation of Section 9 of the Immigration Act of 1903, as amended (R. 27–29). The court accordingly entered such a judgment (R. 29–30).

[2] The court said: "But as to any law of Congress carrying a penalty, made applicable to air commerce by executive order, the penalty provided by Congress in the first instance does apply" (R. 24–25).

On appeal, the court below, with Judge Hutcheson dissenting, affirmed the judgment (R. 45). The decision of the majority was based upon the ground, however, that Section 9 of the Immigration Act was applicable of its own force; that the statute "was designed to protect the health and general welfare of the nation against the hazards incident to the importation of aliens afflicted with any loathsome or contagious disease * * * regardless of the means by which the importation might be accomplished"; and that its language, construed by the court to cover "any person or transportation company," other than railway lines entering the United States from foreign contiguous territories, was intentionally broad enough to include petitioner Pan American Airways (R. 39).

Judge Hutcheson was of the view that for Section 9 to apply of its own force, wholly apart from the suspensive effect of the Air Commerce Act, the carrier must either have entered the United States from foreign contiguous territory or else be a "vessel"; that an aircraft is not a "vessel" and therefore Section 9 standing alone "would furnish no basis whatever for its application to an aircraft bringing a diseased alien from a non-contiguous foreign country," as did petitioner Pan American Airways; that, in any event, the Air Commerce Act of 1926 suspended the application of Section 9 of the Immigration Act to aircraft except as it should specifically be

made applicable by regulations issued by the Secretary of Labor; and that therefore petitioner Pan American Airways' act was a violation only of the Secretary's regulations, to which the $500 penalty provided by Section 11 (b) of the Air Commerce Act was the only penalty properly applicable. (R. 41–44.)

ARGUMENT

1. Contrary to petitioner's position which adopts the dissenting views of Judge Hutcheson (Pet. 2), we believe that there are cogent reasons supporting the opinion of the majority of the circuit court of appeals. The majority opinion, as we are advised by the Chairman of the Board of Immigration Appeals, is in accord with the Board's consistent and long-standing administrative interpretation of Section 9 of the Immigration Act that regards "railway lines entering the United States from foreign contiguous territory" [sec. 9] as the only exception from its coverage. We may concede, as petitioners urge (Pet. 16), that this construction renders the words "entering the United States from foreign contiguous territory" redundant, since railway lines cannot enter the United States except from foreign contiguous territory.[3] It is our belief, however, that these

[3] To be noncontiguous, the territory must be separated by the high seas. *United States* v. *Hunter*, 80 F. (2d) 968, 969–970 (C. C. A. 5). The use of the words "by water" in Section 16 (a) of the Immigration Act of 1924 (8 U. S. C. 216), as applied to transportation of aliens from noncontiguous terri-

descriptive words merely suggest the reason for making an exception from the statute where the carrier entering the United States from foreign contiguous territory is a railway line.

Since railway lines operate on regular schedules between fixed termini, through border ports of entry, an ineligible alien passenger may be turned back at the border, with complete freedom of movement in the contiguous country and a certain and quickly available means of return transportation. Facilities for pre-entrance examination are in fact available.[4] So far as a railway carrier is concerned, there is no basis for compelling it, as distinguished from requesting it,[5] to differentiate, for example, in Mexico, between a passenger who travels from Mexico City to Juarez with the intention of continuing into the United States, and one who makes the same trip intending to remain in Mexico. In many instances, the railway no doubt could not validly refuse to carry the passenger as far as Juarez. Objectively, the journey in Mexico may be completely dissociated from entrance into the United States. There need be no occasion for interning the alien even temporarily within the

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tory, represented a similar redundancy as of the date of the statute's enactment, since the purpose was patently not to differentiate water from air transportation but rather from land transportation. Yet there could have been no need of the words "by water" to create such differentiation, since transportation from noncontiguous territory was never by land.

[4] See 8 U. S. C. 160; 8 C. F. R. 4.2–4.4.

[5] See 8 U. S. C. 217.

United States, as there inevitably is in the case of one whose physical entrance into the United States by vessel, airplane, or in some instances motor vehicle, has become an accomplished fact before an opportunity for the official denial of admission could occur. It is therefore unnecessary to subject a railway carrier to fines that help defray the cost of temporary internment within the United States.[6] Moreover, there is no reason to make the railway carrier responsible financially for the alien's return transportation, since, owing to the circumstances of his exclusion, an impecunious condition on his part poses no problem for this country.

We agree with petitioners' suggestion (Pet. 17) that the words "including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel" [sec. 9], must be deemed to refer back to the phrase "any person." But petitioners' further contention that it follows that "the only sensible construction of Section 9" is that the words "entering the United States from foreign contiguous territory" qualify the words "any person," is, we submit, both erroneous and inconsist-

[6] Like any other carrier, a railway line is in fact subject to a fine of $2,000 for actually bringing an alien into the United States from Canada or Mexico without having provided an approved landing station at the point of entry. 8 U. S. C. 160, 144.

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ent with its premise. For if the words beginning with "including" and ending with "vessel" refer back to "any person," it must follow that the words "or the owner, master, agent, or consignee of any vessel" are in the disjunctive either with "any transportation company" or with "railway lines,"[7] but not with "any person." That they are not in the disjunctive with "any person" is made still clearer by the failure of Congress to repeat immediately preceding them the word "for," which immediately precedes the words "any person." Yet if they are not in the disjunctive with "any person" but instead are partially definitive thereof, and if at the same time petitioners are correct in their contention that "any person" are the words to which the further words "entering the United States from foreign contiguous territory" refer, it must follow that the latter words are equally restrictive with respect to "the owner, master, agent, or consignee of any vessel" and that therefore the entire statute has application only to a carrier entering the United States from foreign contiguous territory. Such a construction would render virtually nugatory the reference to a "vessel," which normally would

[7] They clearly are not in the disjunctive with "railway lines," which are excepted, for such a construction, prior to the advent of air and motor vehicle transportation, would have deprived the statute of all effect, and the statute is clearly applicable to transportation by vessel from noncontiguous territory. *Lloyd Sabaudo Societa Anonima per Azioni* v. *Elting*, 287 U. S. 329.

come from non-contiguous territory, and also the further reference to "any insular possession of the United States," which can never be "foreign contiguous territory"; such an absurd result would thereby be achieved that petitioners' argument must fail.[8]

The phrase "entering the United States from foreign contiguous territory" must, then, modify either "transportation company" or "railway lines." To construe it as modifying "transportation company," as do petitioners (Pet. 16–17), does violence to the word-order and punctuation; to the consistent and long-standing administrative interpretation; and, it is submitted, to the reason for the exception from the statute of railway lines (see pp. 6–7, *supra*). Such a construction as applied to air transportation, unless an airplane is held to be a "vessel," would produce the incongruous result of the statute's being applicable to air transportation of an ineligible alien from Canada or Mexico though not to such transportation from any other foreign country or insular possession of the United States. The application of the statute would thus be contracted in inverse proportion to its need. While petitioners are correct in pointing out (Pet. 18) that it is not uncommon for the customs and immigration laws to deal separately with contiguous and noncontiguous territory,[9] it would be anomalous to con-

[8] See footnote 7, *supra*, p. 8.

[9] See 8 U. S. C. 160, 216, 217.

clude therefrom that the present statute exempts altogether a form of transportation proceeding from noncontiguous territory while including it when proceeding from contiguous territory. To have any semblance of reason or consistency with the general statutory pattern, the distinction between contiguous and noncontiguous territory would have to operate in the present connection in a manner exactly the reverse of that for which petitioners contend (see Pet. 19). The fact that at the time the statute was enacted Congress doubtless had in mind only land and water transportation should not be allowed to produce incongruous results as to subsequently developing forms of transportation if such results, by a reasonable interpretation of the statutory language, may be avoided. We therefore submit that the circuit court of appeals was correct in holding that the sole exception made by the terms of the statute is "of aliens imported by rail from foreign contiguous territories" (R. 39).

The application of the statute to air transportation thus does not depend upon an airplane's being held to be a "vessel" [10] within the meaning of the second disjunctive phrase definitive of the word "person" [sec. 9]. As petitioners admit

[10] A "hydro-aeroplane," moored in navigable waters, has been held subject to admiralty jurisdiction to the exclusion of a state Workmen's Compensation Law. *Matter of Reinhardt* v. *Newport F. S. Corp.*, 232 N. Y. 115 (1921).

(Pet. 16), Pan American Airways is obviously both a "person" and a "transportation company." Since the prohibition is of an act inimical to the welfare of the country, to which the particular mode of transportation is immaterial, aside from the single exception of railway lines not here pertinent, it is submitted that air transportation is not excepted by virtue of its having been nonexistent at the time the statute was first enacted.[11]

Therefore, apart from the possible effect of the provisions of the Air Commerce Act of 1926, the court below correctly held that Section 9 of the Immigration Act is applicable of its own force to air transportation, including such transportation from noncontiguous foreign territory as in the present case.

2. Congress entitled Section 7 of the Air Commerce Act of 1926 (44 Stat. 572) "Application [rather than "Suspension"] of existing laws relating to foreign commerce." Its four subsections deal separately with different kinds of laws relat-

[11] Air transportation of a woman for an immoral purpose clearly falls within the Mann Act of 1910 (18 U. S. C. 398). *Reginelli* v. *United States*, 133 F. (2d) 595 (C. C. A. 3), certiorari denied, 318 U. S. 783. *McBoyle* v. *United States*, 283 U. S. 25 (Pet. 15, 19), is inapposite; it holds merely that the theft of an airplane is not covered by a federal statute that relates not to theft of personal property generally but only to theft of motor vehicles. Here the statute relates generally to transportation of diseased aliens, whatever the means, apart from the single railway exception here immaterial.

ing to foreign commerce. Subsection (a) is the only one purporting to provide that any existing laws "shall not be construed" to apply to aircraft, and it refers only to "navigation and shipping laws," which, both in their natural meaning and from their context, cannot be deemed to include "customs and public health laws," dealt with in subsection (b), or "laws relating to immigration," dealt with in subsection (d).[12] It is significant in this connection that subsections (a), (b), (c), and (d) are wholly separate subsections rather than subdivisions of subsection (a).

Subsection (d) authorized the Secretary of Labor "by regulation to provide for the application to civil-air navigation of the laws and regulations relating to the administration of the immigration laws to such extent and upon such con-

[12] There was good reason for such a special provision with respect to "navigation and shipping laws," which for the most part represent an exercise of admiralty jurisdiction, the application of which to aircraft depended in the first place upon whether the particular craft was a seaplane or a land plane, and in the second place, if a seaplane, upon whether it was in flight, or moored or floating upon navigable water. *Matter of Reinhardt* v. *Newport F. S. Corp.*, 232 N. Y. 115, 117–119 (1921). Yet the requirements of air commerce obviously could not depend upon such distinctions, and therefore, by an exercise of the commerce power, Congress sought in subsection (c) to make possible a practicable and uniform adaptation to all aircraft of the "navigation and shipping laws" already in existence which relate to the entry and clearance of vessels.

ditions as he deems necessary."[13] The scope of the delegation of legislative power to the Secretary of Labor should be construed in such a way as to avoid doubts of its constitutional propriety. Cf. *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, 274; *Driscoll* v. *Edison Light and Power Co.*, 307 U. S. 104, 115; *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14, 40; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 82; *United States* v. *La Franca*, 282 U. S. 568, 574. If its scope is confined to the adaptation to air commerce of existing laws and regulations that, but for being couched in terms exclusively applicable to land or water carriers, would with good reason apply to air commerce, the delegation is of a kind readily sustainable. Cf. *J. W. Hampton, Jr., & Company* v. *United States*, 276 U. S. 394; *Field* v. *Clark*, 143 U. S. 649. So confined, an adequate standard for both administrative and judicial application is inherent in the subject matter. *United States* v. *Grimaud*, 220 U. S. 506.

An interpretation so restricting the scope of the delegation is consistent with the words "to

[13] Congress evidently intended to distinguish between "immigration laws" and "laws and regulations relating to the administration of the immigration laws." Section 9 of the Immigration Act is probably a law of the latter kind, since its purpose is to implement and enforce the exclusion of aliens rendered ineligible to admission by another Section (8 U. S. C. 136), which itself is more strictly an "immigration law."

such extent and upon such conditions as he deems necessary." These words imply not unlimited discretion but the exercise of a reasonable judgment as to the necessity. The basis for such a judgment clearly exists where the reasons for a law in terms applicable only to land or water carriers would apply to air carriers. To make possible the needed flexibility and variation to meet the requirements of air commerce, Congress did not require the adoption *in toto* of such laws, or under all conditions. But where, however, an existing law is in reason and by its own terms as clearly applicable to air commerce as is Section 9 of the Immigration Act, there would seem to be no place left for the exercise of a judgment by the Secretary of Labor as to the necessity for such application, short of a complete relinquishment by Congress to the Secretary, until reclaimed, of its legislative power in the premises. The Air Commerce Act cannot be interpreted as suspending all such existing laws in their application to air commerce subject to revival in whole or in part by the Secretary and upon conditions designated by him, without raising serious constitutional doubts based on the absence of a sufficient standard to justify such a questionably broad delegation.[14]

[14] The situation is not comparable to that which in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, was held in effect to justify the delegation to the President of an unfettered discretion in a matter of foreign relations.

We submit, therefore, that the extent of the Secretary's delegated power under the Air Commerce Act was the adaptation to air commerce of existing laws and regulations that were inapplicable of their own force but which, apart from their being phrased in words exclusively applicable to land or water carriers, would with good reason apply in whole or in part or under all or some conditions to it; and that the Air Commerce Act did not suspend, subject to revival at the discretion of the Secretary, any law relating to the administration of the immigration laws that was already applicable of its own force to air carriers and carried its own penalty. This construction is reinforced by the legislative history of the Air Commerce Act which, while providing no clear answer to the points at issue, shows a purpose "to prevent the use of aircraft as instruments for evading our customs, public health, narcotic drug, and neutrality [and presumably immigration] laws." [15] Such a purpose is promoted by the con-

[15] H. Rep. No. 1262, 68th Cong., 2d Sess., p. 3. Compare, however, the following statement by Frederic P. Lee, Legislative Counsel, United States Senate, in *The Air Commerce Act of 1926*, 12 A. B. A. J. 371, 374 (1926): "Finally, the laws relating to the entry and clearance of vessels, the customs laws, the immigration laws, and the public health laws are to be made applicable to air commerce by regulations of the respective Secretaries administering such laws. At present the entry and clearance laws and the customs laws by reason of definitions of vessel and vehicle which are broad enough to include aircraft, apply to air

struction for which we contend, but not by one which would suspend laws already applicable to aircraft.

Further support for the more restrictive construction derives from a consideration of the penalty provision of Section 11 (b) of the Air Commerce Act, which subjects any person violating "any immigration regulation made under" Section 7 (d) "to a civil penalty of $500 which may be remitted or mitigated by the * * * Secretary of Labor * * * in accordance with such proceedings as the Secretary shall by regulation prescribe." It is significant, as the district court pointed out (R. 24–25), that the statutory language refers expressly to "any immigration *regulation made* under" [italics supplied], rather than to any law adopted pursuant to, Section 7 (d). And it is difficult to impute to Congress an intention, nowhere expressed by it, to create such a great disparity between air and other carriers with respect to the civil consequences of the same act. The construction for which petitioners contend not only would cut the $1,000 penalty of Section 9 of the Immigration Act in half in the case of air carriers, but would also allow remission or mitigation to them exclusively and would relieve

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commerce. Being framed, however, without a knowledge of or with special regard to the needs of air commerce, such laws are so unreasonably restrictive in their application to air commerce that carriers by air would find it impossible in practice to comply with the provisions of such laws."

them entirely of the financial responsibility for the alien's return that is imposed on other carriers by the same Section. It would be difficult to establish reasons justifying such discrimination even if the legislation expressly provided for this effect. Nor would such a construction represent the type of adaptation to the special requirements of air commerce that otherwise actuated Congress in enacting the 1926 statute. An intent to provide such an unwarranted discrimination should accordingly not be imputed.

3. It is submitted that the foregoing analysis sustains the decision of the circuit court of appeals that Section 9 of the Immigration Act has remained in effect of its own force. In the alternative, however, if, as petitioners contend (Pet. 13–15), the effect of the Air Commerce Act of 1926 was to suspend the application of Section 9 to air commerce, subject to later revival by adoptive regulations issued by the Secretary of Labor, the same reasoning (pp. 16–17, *supra*), based on the language of Section 11 (b) of the later statute and the unwarranted discrimination as to civil consequences that would otherwise result in favor of air carriers, sustains the decision of the district court that, when adopted, Section 9 continued to carry its own penalty. Only in the event of a determination that Section 9 was never at any time applicable of its own force to air carriers, but was made applicable for the first time by the regulations issued by the Secretary of Labor, could a

plausible case be made for the substitution of the $500 for the $1,000 penalty. Such a view, however, is of doubtful consistency with Rules 5A2 and 5G1 of the Immigration Laws and Rules of January 1, 1930, as originally promulgated (*infra,* pp. 24–25), and is clearly inconsistent with a subsequent amendment to those rules providing expressly that where the act of an air carrier "would be a violation of the immigration laws and general regulations *if the aircraft were a vessel* (*operating on water*), the penalty shall be the same *as would apply* in the case of a vessel" [italics supplied]. (8 C. F. R., 1941 Supp., 116.60 (a).) The administrative position is that a statutory provision given application to air commerce by an adoptive regulation issued pursuant to Section 7 (d) of the Air Commerce Act, continues to carry its own penalty, even though it had no previous application of its own force to such commerce. This avoids the making of an unwarranted discrimination between air and other carriers with respect to the civil consequences of the same act. No greater degree of delegation is involved in the administrative adoption of a statute carrying with it its own penalty than in the administrative adoption of a statute to which is made applicable the $500 penalty of the Air Commerce Act. In either event, Congress itself has provided the penalty in advance, and created the liability, within the meaning of constitutional requirements (*United States* v. *Grimaud,* 220 U. S. 506).

While, as petitioners point out (Pet. 21), the Secretaries of the Treasury and of Commerce have provided only for the $500 penalty of the Air Commerce Act,[16] they have not purported to make applicable to air carriers, by the method of incorporation by reference, any of the laws relating to customs or to the entry and clearance of vessels. Instead, they have promulgated regulations which, although based upon such laws, are complete in themselves; and the penalty provided is for a violation of any of these regulations. There was therefore no occasion for these Secretaries to recognize as applicable a different penalty where provided by a statute adopted by reference, since no statute was so adopted; and their failure to do so is without the significance that petitioners attach to it. Under the circumstances, their provision for the $500 penalty alone is fully consistent with the view of the district court in the present case that such penalty of the Air Commerce Act is the one applicable wherever the violation is of an administrative regulation as distinguished from a statute, adopted by reference, that carries its own penalty (R. 24–25).[17]

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[16] 14 C. F. R. 94.17, 94.20; 19 C. F. R., 1941 Supp., 4.10b, 4.10c, 4.10e.

[17] Petitioners' contention (Pet. 19) that "this is not a suit to collect a penalty as such, but an action to enforce a bond," and that Section 9 of the Immigration Act does not of its own force operate to require a bond of the owner of an aircraft, is without merit. Petitioners are estopped to assert such a defense to liability on the bond. *Carroll* v. *National Surety Co.*, 24 F. (2d) 268, 270 (App. D. C.). Furthermore,

CONCLUSION

While the questions of statutory construction are novel and difficult, the courts below, we think, reached the correct result, and there is involved no conflict of decisions. Moreover, since the problem concerns the bringing in by aircraft of diseased aliens from foreign noncontiguous territory, it would seem, in view of the abnormal conditions now prevailing, that it is one which is not likely to recur with any frequency, at least for the present. Indeed, the circumstance that this is the first case involving the problem which has arisen since the inauguration of foreign air commerce would seem to indicate that, even under normal conditions, the question is not one of especial importance. Review on certiorari, therefore, may well be postponed, we believe, until such time as conflict with another circuit may arise. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
EDWARD G. JENNINGS,
Special Assistants to the Attorney General.

SEPTEMBER 1943.

Section 7 (d) of the Air Commerce Act of 1926 clearly authorized the Secretary of Labor to make applicable to air carriers, to secure their obligation under Section 9 of the Immigration Act, the requirement of a bond already applicable under Section 9 to owners of vessels. The enforceability of the bond thus in no way depends upon whether the source of the liability secured is derived from Section 9 of the Immigration Act or Section 11 (b) of the Air Commerce Act.

APPENDIX

Section 9 of the Immigration Act of 1903, as amended (Acts of March 3, 1903, c. 1012, 32 Stat. 1215; Feb. 5, 1917, c. 29, § 9, 39 Stat. 880; May 26, 1924, c. 190, § 26, 43 Stat. 166) (8 U. S. C. 145), provides:

> It shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel, to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional psychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Attorney General [formerly the Secretary of Labor] that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from

the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of the provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. * * * No vessel shall be granted clearance papers pending the determination of the question of the liability to the payment of such fines, or while the fines remain unpaid, nor shall such fines be remitted or refunded; but clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fines or of a bond with sufficient surety to secure the payment thereof, approved by the collector of customs. * * *

Section 7 of the Air Commerce Act of 1926 (Act of May 20, 1926, c. 344, § 7, 44 Stat. 572) (49 U. S. C. 177) provides:

SEC. 7. *Application of existing laws relating to foreign commerce.*

(a) *Application of navigation and shipping laws to aircraft.* The navigation and shipping laws of the United States, including any definition of "vessel" or "vehicle" found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft.

(b) *Designation of ports of entry; detail of officers; application of customs and public health laws.* The Secretary of the Treasury is authorized to (1) designate places in the United States as ports of entry for civil aircraft arriving in the United States from any place outside thereof and for merchandise carried on such aircraft, (2) detail to ports of entry for civil

aircraft such officers and employees of the customs service as he may deem necessary, and to confer or impose upon any officer or employee of the United States stationed at any such port of entry (with the consent of the head of the Government department or other independent establishment under whose jurisdiction the officer or employee is serving) any of the powers, privileges, or duties conferred or imposed upon officers or employees of the customs service, and (3) by regulation to provide for the application to civil air navigation of the laws and regulations relating to the administration of the customs and public health laws to such extent and upon such conditions as he deems necessary.

(c) *Application of laws relating to entry and clearance of vessels.* The Secretary of Commerce is authorized by regulation to provide for the application to civil aircraft of the laws and regulations relating to the entry and clearance of vessels to such extent and upon such conditions as he deems necessary.

(d) *Designation of ports of entry for aliens; detail of officers; application of laws relating to immigration.* The Attorney General [formerly the Secretary of Labor] is authorized to (1) designate any of the ports of entry for civil aircraft as ports of entry for aliens arriving by aircraft, (2) detail to such ports of entry such officers and employees of the immigration service as he may deem necessary, and to confer or impose upon any employee of the United States stationed at such port of entry (with the consent of the head of the Government department or other independent establishment under whose jurisdiction the officer or employee is serving) any of the powers,

> privileges, or duties conferred or imposed upon officers or employees of the immigration service, and (3) by regulation to provide for the application to civil-air navigation of the laws and regulations relating to the administration of the immigration laws to such extent and upon such conditions as he deems necessary.

Section 11 (b) of the Air Commerce Act of 1926 (Act of May 20, 1926, c. 344, § 11 (b), 44 Stat. 574) originally provided:[18]

> (b) Any person who (1) violates any provision of subdivision (a) of this section or any entry or clearance regulation made under section 7, or (2) any customs or public health regulation made under such section, or (3) any immigration regulation made under such section, shall be subject to a civil penalty of $500 which may be remitted or mitigated by the Secretary of Commerce, the Secretary of the Treasury, or the Secretary of Labor, respectively, in accordance with such proceedings as the Secretary shall by regulation prescribe. * * *

Rules 5A2 and 5G1 of the Immigration Laws and Rules of January 1, 1930 (8 C. F. R. 5.2, 5.17), provided:

> Rule 5A2. Civil aircraft engaged in foreign air commerce and bringing passengers from Canada or Mexico shall, for the purpose of the immigration laws and regulations, except as herein provided for, be re-

[18] Certain amendments not here material were subsequently made (Acts of June 19, 1934, c. 656, § 2, 48 Stat. 1116; June 23, 1938, c. 601, § 1107 (i) (9), 52 Stat. 1029) (49 U. S. C. 181 (b)). Their purpose and immateriality here are discussed in the district court's opinion (R. 25–26).

garded as are other common carriers bringing aliens to border ports of entry from such countries. All other civil aircraft engaged in foreign commerce shall, for the purpose of the immigration laws and regulations, except as otherwise provided, be treated as vessels.[19]

Rule 5G1. For a violation of any of these regulations, unless the penalty for such violation is otherwise provided for by immigration laws and general regulations, the civil penalty of $500 authorized by section 11, paragraph (b), Air Commerce Act of 1926 * * *, will be enforced.[20] * * *

[19] This rule has subsequently been amended so as to read: Aircraft arriving from Canada or Mexico and landing at a land border port of entry and aircraft departing from such port of entry for Canada or for Mexico shall for the purposes of the immigration laws and regulations, except as otherwise provided in this Part, be regarded the same as other common carriers arriving at or departing from land border ports of entry. All other aircraft operating in foreign commerce or between areas of the United States shall for the purposes of the immigration laws and regulations be subject to the same requirements and liabilities as are vessels (operating on water) except as otherwise provided in this part or by statute specifically relating to aircraft. (8 C. F. R., 1941 Supp., 116.52.)

[20] This has subsequently been amended so as to read: Any person who violates any provision of this part which relates to immigration shall be subject to the civil penalty of $500 authorized by section 11 (b), Air Commerce Act of 1926, as amended (49 U. S. C. 181 (b)), except that where such offense in connection with an aircraft would be a violation of the immigration laws and general regulations if the aircraft were a vessel (operating on water), the penalty shall be the same as would apply in the case of a vessel. (8 C. F. R., 1941 Supp., 116.60 (a).)

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